

**58-1-404 Diversion -- Procedure.**

- (1) As used in this section, "diversion" means suspending action to discipline a licensee who is or could be charged in a Notice of Agency Action with certain offenses within the category of unprofessional or unlawful conduct on the condition that the licensee agrees to participate in an educational or rehabilitation program or fulfill some other condition.
- (2)
  - (a)
    - (i) The director may establish a diversion advisory committee for each occupation or profession or similar groups of occupations or professions licensed by the division.
    - (ii) The committees shall assist the director in the administration of this section.
  - (b)
    - (i) Each committee shall consist of at least three licensees from the same or similar occupation or profession as the person whose conduct is the subject of the committee's consideration.
    - (ii) The director shall appoint the members of a diversion advisory committee from nominations submitted by the corresponding board established for the same or similar occupation or profession under Section 58-1-201 or from other qualified nominees developed by or submitted to the division.
    - (iii) Committee members may not serve concurrently as members of the corresponding board.
    - (iv) Committee members shall serve voluntarily without remuneration.
    - (v) The director may:
      - (A) dissolve a diversion advisory committee;
      - (B) remove or request the replacement of a member of a committee; and
      - (C) establish procedures that are necessary and proper for a committee's administration.
- (3) The director may, after consultation with the appropriate diversion advisory committee and by written agreement with the licensee, divert the licensee to a diversion program:
  - (a) at any time after receipt by the division of a complaint against the licensee when no adjudicative proceeding has been commenced;
  - (b) at any time prior to the conclusion of a hearing under Section 63G-4-206 when an adjudicative proceeding has been commenced against the licensee; or
  - (c) after a self-referral by a licensee who is not the subject of a current investigation, complaint, or adjudicative proceeding.
- (4)
  - (a) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the division shall define by rule the particular offenses within the category of unprofessional or unlawful conduct that may be subject to diversion.
  - (b) A licensee may be eligible for a diversion program only once for the same or similar offense, whether the diversion program was in this state or another jurisdiction, and is not eligible if previously disciplined by the division, by a licensing agency of another state, or by a federal government agency for the same or a similar offense.
  - (c) The term of a diversion agreement shall be five years or less, but may be extended for an additional period of time as agreed to by the parties in writing.
  - (d) A decision by the director not to divert a licensee is not subject to appeal or judicial review.
- (5) A licensee may be represented by counsel:
  - (a) during the negotiations for diversion;
  - (b) at the time of the execution of the diversion agreement; and
  - (c) at each hearing before the director relating to a diversion program.
- (6)

- (a) As used in this section, "diversion agreement" means a written agreement between the division, through its director, and the licensee, which specifies formal terms and conditions the licensee must fulfill in order to comply with the diversion program.
- (b)
  - (i) A diversion agreement shall contain a full detailed statement of the requirements agreed to by the licensee and a full detailed stipulation of the facts upon which the diversion agreement is premised.
  - (ii) The facts stipulated in the diversion agreement shall constitute binding admissions of the licensee:
    - (A) in a proceeding under Subsection (6)(c) or (6)(d) to terminate the diversion agreement and impose disciplinary sanctions against the licensee; and
    - (B) in a disciplinary proceeding based on unprofessional or unlawful conduct that is not the basis of the diversion agreement.
- (c) The diversion agreement shall provide that if the licensee makes an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement, the director shall initiate the procedures set forth in Subsection (13) to terminate the diversion agreement and issue an order of license revocation.
- (d)
  - (i) The diversion agreement shall provide that if the licensee fails to comply with its terms, the director shall initiate the procedures set forth in Subsection (14) to terminate the diversion agreement and issue an order of license suspension, which shall be stayed in favor of an order of probation having the same terms as those that comprised the diversion agreement.
  - (ii) The division may waive and not include as probationary requirements each term of the diversion agreement it does not consider necessary to protect the public.
  - (iii) The term of the order of probation shall be as provided in Subsection (14)(c)(ii).
- (e) The division director may not approve a diversion agreement unless the licensee, as part of the diversion agreement:
  - (i) knowingly and intelligently waives the right to a hearing under Title 63G, Chapter 4, Administrative Procedures Act, for the conduct upon which the diversion agreement was premised;
  - (ii) agrees to be subject to the procedures and remedies set forth in this section;
  - (iii) acknowledges an understanding of the consequences of making an intentional misrepresentation of fact in the stipulation of facts contained in the diversion agreement; and
  - (iv) acknowledges an understanding of the consequences of failing to comply with the terms of the diversion agreement.
- (7)
  - (a) If the division and the licensee enter into a diversion agreement after the division has commenced an adjudicative proceeding against the licensee, the director shall stay that proceeding pending completion of the diversion agreement.
  - (b) The order staying the adjudicative proceeding shall be filed in that proceeding and may reference the diversion agreement.
- (8)
  - (a) Upon successful completion of a diversion agreement, the director shall dismiss each charge under the director's jurisdiction of unprofessional or unlawful conduct that was filed against the licensee.

- (b) Whether or not an adjudicative proceeding had been commenced against the licensee, the division may not thereafter subject the licensee to disciplinary action for the conduct that formed the basis of the completed diversion agreement.
  - (c) Neither the execution of a diversion agreement nor the dismissal of filed charges constitute disciplinary action, and no report of either may be made to disciplinary databases.
  - (d) The division may consider the completion of a diversion program and the contents of the diversion agreement in determining the appropriate disciplinary action if the licensee is charged in the future with the same or similar conduct.
  - (e) The order of dismissal shall be filed in the adjudicative proceeding in which the misconduct was charged and may reference the diversion agreement.
- (9)
- (a) Acceptance of the licensee into diversion does not preclude the division from investigating or continuing to investigate the licensee for unlawful or unprofessional conduct committed before, during, or after participation in the diversion program.
  - (b) Acceptance of the licensee into diversion does not preclude the division from taking disciplinary action or continuing to take disciplinary action against the licensee for unlawful or unprofessional conduct committed before, during, or after participation in the diversion program, except for that conduct that formed the basis for the diversion agreement.
  - (c) A licensee terminated from the diversion program for failure to comply with the diversion agreement is subject to disciplinary action by the division for acts committed before, during, and after participation in the diversion program, including violations identified in the diversion agreement.
- (10) The classification, retention, and disclosure of records relating to a licensee's participation in the diversion program is governed by Title 63G, Chapter 2, Government Records Access and Management Act, except that a provision in the diversion agreement that addresses access to or release of diversion records regarding the licensee shall govern the access to and release of those records.
- (11) Notwithstanding any other provision of this section, the fact that the licensee completed a diversion program and the contents of the diversion agreement itself may be considered by the division in determining the appropriate disciplinary action if the licensee is charged in the future with the same or similar conduct.
- (12) Meetings regarding the diversion program are not subject to Title 52, Chapter 4, Open and Public Meetings Act.
- (13)
- (a) If, during the course of the diversion agreement, information is brought to the attention of the director that the licensee made an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement, the director shall cause to be served upon the licensee an order to show cause specifying the information relied upon by the director and setting a time and place for a hearing to determine whether or not the licensee made the intentional material misrepresentation of fact and whether the agreement should be terminated on that ground.
  - (b) Proceedings to terminate a diversion agreement on the grounds that the licensee made an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement and to issue an order of license revocation shall comply with Title 63G, Chapter 4, Administrative Procedures Act, except as follows:
    - (i) the notice of agency action shall be in the form of an order to show cause, which shall contain all of the information specified in Subsection 63G-4-201(2), except a statement that a written response to the order to show cause is required;

- (ii) no written response to the order to show cause is required;
    - (iii) discovery is prohibited, but the division may issue subpoenas or other orders to compel production of necessary evidence on behalf of either party and all parties shall have access to information contained in the division's diversion file to the extent permitted by law;
    - (iv) the hearing shall be held only after timely notice to all parties; and
    - (v) an agency review or reconsideration of an order terminating a diversion agreement or of an order of license revocation pursuant to this Subsection (13) shall be limited to the division director's findings of fact, conclusions of law, and order that arose out of the order to show cause proceeding.
  - (c) Upon finding the licensee made an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement and that terminating the agreement is in the best interest of the public, and issuing an order to that effect, the director shall issue an order of license revocation, revoking the licensee's professional license.
  - (d) The order terminating the diversion agreement and the order of license revocation shall include findings of fact and conclusions of law as determined by the director following the hearing or as otherwise stipulated and agreed to by the parties.
  - (e) If the diversion agreement being terminated was entered into after the division had commenced an adjudicative proceeding against the licensee, that adjudicative proceeding shall be considered to be merged into the order of license revocation and it may not constitute a basis for a separate disciplinary action against the licensee.
  - (f) The order terminating the diversion agreement and the order of license revocation shall notify the licensee of the right to request agency review or reconsideration.
- (14)
- (a) If, during the course of the diversion agreement, information is brought to the attention of the director that the licensee has violated the diversion agreement and if it appears in the best interest of the public to proceed with charges, the director, after consultation with the diversion advisory committee, shall cause to be served upon the licensee an order to show cause specifying the facts relied upon by the director and setting a time and place for a hearing to determine whether or not the licensee has violated the diversion agreement and whether the agreement should be terminated.
  - (b) Proceedings to terminate a diversion agreement as described in Subsection (14)(c) shall comply with Title 63G, Chapter 4, Administrative Procedures Act, except as follows:
    - (i) the notice of agency action shall be in the form of an order to show cause, which shall contain all of the information specified in Subsection 63G-4-201(2), except a statement that a written response to the order to show cause is required;
    - (ii) no written response to the order to show cause shall be required;
    - (iii) discovery is prohibited, but the division may issue subpoenas or other orders to compel production of necessary evidence on behalf of either party and all parties shall have access to information contained in the division's diversion file to the extent permitted by law;
    - (iv) the hearing shall be held only after timely notice to all parties; and
    - (v) an agency review or reconsideration of an order terminating a diversion agreement or of an order of license suspension and probation pursuant to this Subsection (14) shall be limited to the division director's findings of fact, conclusions of law, and order that arose out of the order to show cause proceeding.
  - (c)
    - (i) Upon finding the licensee has violated the diversion agreement by conduct that is entirely the same or similar to the conduct upon which the diversion agreement is premised, or by violating a compliance provision contained in the diversion agreement, and further finding

that terminating the agreement is in the best interest of the public, and after issuing an order to that effect, the director shall issue an order of probation, consisting of the same terms as those which comprised the diversion agreement.

- (ii) Upon finding that the licensee has violated the diversion agreement by conduct that includes conduct that is not the same or similar to the conduct upon which the diversion agreement is premised, and further finding that terminating the agreement is in the best interest of the public, and after issuing an order to that effect, the director shall, after notice of opportunity to be heard is provided to the licensee, issue an order imposing each disciplinary sanction the division deems appropriate, including suspension, public reprimand, a fine, probation, or revocation of licensure.
  - (iii) The period of probation shall be the time period which remained under the diversion agreement, or five years from the date of the order of license suspension and probation, whichever is longer, unless otherwise agreed by the parties.
  - (iv) The period of probation is tolled during the time the licensee does not have an active license in the state.
- (d)
- (i) The order terminating the diversion agreement and the order of license suspension and probation shall include findings of fact and conclusions of law as determined by the director following the hearing or as otherwise stipulated and agreed to by the parties.
  - (ii) The findings of fact may include those facts to which the licensee stipulated in the diversion agreement and additional facts as the director may determine in the course of the hearing.
- (e) If the diversion agreement being terminated was entered into after the division had commenced an adjudicative proceeding against the licensee, that adjudicative proceeding shall be considered to be merged into the order of license suspension and probation and it may not constitute a basis for separate disciplinary action against the licensee.
- (f) The order terminating the diversion agreement and the order of license suspension and probation shall notify the licensee of the right to request agency review or reconsideration.
- (g)
- (i) The terms and conditions of the order of license suspension and probation may be amended by order of the director, pursuant to motion or stipulation of the parties.
  - (ii) The order of the director on the motion shall not be subject to agency review, but is subject to agency reconsideration under Section 63G-4-302.
- (h)
- (i) If, during the course of probation, the director has reason to believe the licensee has violated the order of probation, the director shall cause to be served upon the licensee an order to show cause why the probation should not be terminated and why each additional disciplinary sanction the division deems appropriate should not be imposed, including suspension, public reprimand, a fine, or revocation of licensure.
  - (ii) The order to show cause shall specify the facts relied upon by the director and shall set a time and place for hearing before the director to determine whether or not the licensee has violated the order of probation, whether that order should be terminated, and why each additional disciplinary sanction the division deems appropriate should not be imposed, including suspension, public reprimand, a fine, or revocation of licensure.
- (15)
- (a) Nothing in this section precludes the division from issuing an emergency order pursuant to Section 63G-4-502.
  - (b) If the division issues an emergency order against a licensee who is subject to a diversion agreement with the division, that diversion agreement shall be immediately and automatically

terminated upon the issuance of the emergency order, without requiring compliance with the provisions of Title 63G, Chapter 4, Administrative Procedures Act.

(c)

- (i) A licensee whose diversion agreement has been terminated pursuant to Subsection (15)(b) is entitled, upon request, to a posttermination hearing to challenge the termination of the diversion agreement.
  - (ii) The request shall be considered a request for agency action and shall comply with the requirements of Subsection 63G-4-201(3).
  - (iii) The division shall uphold the termination of the diversion agreement if it finds that:
    - (A) the licensee violated the diversion agreement; and
    - (B) it is in the best interest of the public to terminate the diversion agreement.
- (16) The administrative statute of limitations for taking disciplinary action described in Subsection 58-1-401(6) shall be tolled during a diversion program.

Amended by Chapter 262, 2013 General Session